United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,964

BERNARD LYON FRISHMAN

Appellant

v.

MILDRED M. STONEBREAKER

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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*Cases chiefly relied upon are marked by asterisks.

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

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STATEMENT OF ISSUES PRESENTED FOR REVIEW*

Does a clause in a promissory note declaring the balance canceled and paid in full in the event of the payee's default as tenant under a lease with the maker as landlord, the lease and note being part of the same transaction, constitute an enforceable liquidated damage provision when the cancellation does not terminate all liability of the payee to the maker, but the payee remains liable for such damages as the maker landlord may sustain under the lease?

*This case has not previously been before this Court.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment entered February 14, 1968, dismissing appellant's complaint for money judgment and declaratory relief filed by appellant in the United States District Court for the District of Columbia.

Notice of Appeal was filed March 6, 1968. Jurisdiction of this appeal is granted by 28 U.S.C. §1291.

STATEMENT OF THE CASE

This is an appeal from a Judgment of the United States District Court for the District of Columbia (Gerhard A. Gesell, Judge) in favor of defendant[1] dismissing plaintiff's complaint for balance due on a promissory note and for a Declaratory Judgment that the provision in the promissory note providing for cancellation in the event of a default under a lease, was a penalty and unenforceable.

The case was submitted to the trial court for decision upon Plaintiff's Statement of Facts (JA 9-12) and Defendant's Statement of Facts (JA 12-15). The Statements, and the various exhibits referred to therein were received in evidence by consent (JA 138).

The undisputed facts disclose that sometime prior to October 22, 1962, plaintiff acting through his agent, contacted defendant's husband, acting as her agent to indicate his interest in leasing defendant's real estate described as Lot 852, Square 107, premises 1835 K Street, N.W. for ninety-nine years. The purpose of the acquisition was to allow the development of the site by either remodeling the

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[1] For convenience and clarity, the parties will be referred to as plaintiff and defendant. All references to plaintiff are to the appellant, Bernard Lyon Frishman and all references to defendant are to the appellee, Mildred M. Stonebraker.

existing structure or razing it and constructing an office building (JA 9).

After some discussion and on October 22, 1967, plaintiff submitted a letter (JA 16) offering to lease the real estate for ninety-nine years on the terms therein set forth.

This initial offer to lease was declined by the defendant (JA 12), but discussions were reopened on or about December 5, 1962. Defendant at this time, indicated through her agent, that a lease for the net yearly rental of $48,000.00 was satisfactory, but she wished the first year's rent paid in advance, one year's rent paid in escrow for the term of the lease as a security deposit and that plaintiff assume an existing first mortgage of about $42,000.00 (JA 13).

The parties and their advisors met on December 10, 1962, relative to the lease, but the meeting ended without resolving the matter (JA 13).

On or about December 31, 1962, after a prior telephone call from plaintiff's agent to defendant's agent (JA 13) the parties met at the office of plaintiff's agent. At this meeting agreement was reached on substantially all terms including rent and the making of a loan to defendant to pay off the existing mortgage which loan was to be repaid at $550.00 per month with the best interest rate available not to exceed 6% (JA 13-14).

In either the prior telephone call or the meeting of December 31, 1962, the proposal was made by plaintiff, and not by defendant, that the note which would be given to evidence repayment of the loan of approximately $42,000.00 for paying off of the mortgage would be payable at the rate of $550.00 per month out of the rent to be paid by plaintiff and would be canceled if plaintiff should default under the lease (JA 14).

Following the meeting of December 31, 1962, plaintiff prepared, executed and delivered to defendant an undated option to lease (JA 17-21) which included in paragraph 9 the provisions regarding the terms of repayment of the note to be given to plaintiff by defendant.

On March 22, 1962, the plaintiff and others with whom he was then associated, but who subsequently assigned their lease-hold interest to plaintiff (JA 65-69), as tenants, entered into a ninety-nine year non-subordinated ground lease, with defendant, as landlord (JA 21-50). Said Agreement of Lease was a combination option and lease which granted tenant, for the consideration of $5,000.00, an option to lease on the terms therein set out, to be exercised not later than four months from the date of execution and upon payment of $24,000.00 as the first six months' rental and the additional sum of $24,000.00 as a building security deposit (JA 10). In addition, tenant, upon exercising said option was to advance not more than $41,428.63, or such balance as might then be due and owing, to release and pay off an existing first trust pursuant to paragraph 5 of said lease (JA 10) (JA 28-29).

Contemporaneously with the execution of said lease, plaintiff and Murray B. Silverman, who was then associated with him, entered into a written Guarantee whereby they guaranteed the payment of all rent, tax rent, additional rent and all other additional payments to be made by tenant under the lease and the observance by tenant of all the other terms, covenants, conditions and agreements therein provided to be performed and observed by tenant, said guarantors to be jointly and severally liable with the tenant (JA 10) (JA 49-50).

On June 26, 1963, settlement was held at the District Title Insurance Company and plaintiff paid to defendant the sum of $49,235.00 (JA 52), representing the first six-months' rent and the building security deposit, and the further sum of $39,642.20 (JA 53)

which was the then balance due under the first trust on the property. At this time, defendant executed the promissory note (JA 3-4) (JA 54-55) which is the subject of this action.

The building security deposit in the sum of $24,000.00 was held by the title company as security for the performance by tenant of its obligation to remodel or rebuild the improvements on the demised premises, requiring plaintiff to secure possession of the individually rented or leased units in the premises on or before January 15, 1964, and begin either remodeling or razing the building, the failure of which would constitute a default under the lease and would entitle the landlord to retain the security deposit as liquidated damages for said default without prejudice to other rights against tenant therefor (JA 24-25). In the event that tenant secured possession of all the individually leased units in the premises and began remodeling or new construction of the improvements thereon on or before January 15, 1964, the building security deposit was to be applied as rental for the next full six-month period (JA 25).

The promissory note (JA 3-4) provided that principal and interest were payable in monthly installments of $550.00 on the first day of each and every month until paid. The first six monthly installments were to be paid in cash by the defendant and thereafter by the plaintiff deducting the amount of such monthly installment from the monthly rental due under the Agreement of Lease. The note further provided, among other things, that "in the event of default under the aforementioned Agreement of Lease, the balance then remaining unpaid on this promissory note at date of such default shall be deemed as canceled and paid in full" (JA 3). The said provisions embodied in the promissory note were also contained in paragraph 5 of the Lease (JA 28-29).

On March 5, 1964, plaintiff and his wife obtained a construction loan of $950,000.00 from the Public National Bank, for the

purpose of remodeling the premises, and gave their promissory note, secured by a Deed of Trust of even date (JA 11) (JA 69-72) (JA 73-91).

Plaintiff thereafter contracted with Construction Associates, Inc. to handle the remodeling on the subject real estate, and in the fall of 1964 certain difficulties arose which led to the job being halted, liens being placed against the realty and a multitude of other problems, all as reflected in letters from Seymour Friedman, attorney for defendant, to the plaintiff dated December 24, 1964 (JA 91-92), January 5, 1965 (JA 93-94), January 14, 1965 (JA 94-95), and January 20, 1965 (JA 95-96). Mr. Friedman's letter of January 5, 1965, declares the defendant's promissory note canceled and paid in full and sets forth that this is being done "without waiving any other rights to which landlord may be entitled" (JA 11) (JA 93).

Rent under the lease was received by defendant through January 31, 1965, and payments under the note were credited through December 31, 1964 (JA 15). The balance due on said note at that time was $32,802.83 (JA 12).

On January 28, 1965, the Public National Bank foreclosed on the first deed of trust and bought in the leasehold interest of plaintiff (JA 12). A deed from the trustees to the bank dated February 27, 1965, was recorded on April 22, 1965, among the Land Records of the District of Columbia (JA 97-101).

On March 4, 1965, the defendant and the Public National Bank entered into a written Agreement of Lease (JA 102-127) for a term of ninety-seven years and four months, the then remaining term, and on August 25, 1966, this lease was assigned to Harry L. Weisman and Edgar Weisman with defendant's consent (JA 128-131). This assignment released the bank of all liability to defendant.

As a result of the execution of the new lease with the Public National Bank on substantially similar terms and conditions, and the subsequent assignment thereof to Messrs. Weisman, defendant has continued to receive rent under the lease since its execution and all mechanic's liens were removed (JA 15). Defendant has suffered no damage as a result of any default under her lease with plaintiff. The trial court's finding, "apparently there was loss of about a few months' rent and expenses incident to arranging a new lease" (JA 143) has no support in the evidence (JA 15).

The parties were represented by counsel throughout the entire transaction and there was no overreaching (JA 141) (JA 137).

SUMMARY OF ARGUMENT

The promissory note provision as to cancellation and payment in full is a penalty as (a) it was not a just or reasonable estimation of the compensation to be caused by the harm (b) it was not a reasonable protection against uncertain future litigation and (c) it imposed the same sanctions for a trivial or substantial breach of lease.

A party's willingness to pay a penalty has no significance in determining the legal effect of an instrument.

ARGUMENT

I.

THE PROMISSORY NOTE PROVISION AS TO CANCELATION AND PAYMENT IN FULL IS A PENALTY AND NOT AN ENFORCEABLE LIQUIDATED DAMAGE PROVISION

A. The Amount Fixed Was Not A Just or Reasonable Estimation of the Compensation to be Caused by the Harm

The defendant, by reserving to herself the right, in event of default under the lease, to treat the note given by her to plaintiff as "canceled and paid in full", in addition to any other rights and remedies which she may possess with respect to such default, caused the cancellation and payment provision to constitute a penalty or fine.

To constitute liquidated damages, the amount fixed must be made in good faith; must be a reasonable forecast or estimation of just compensation to be caused by the harm; and the breach must be one that is incapable or very difficult of accurate estimation. *Koethe v. R. C. Taylor Trust*, 280 U.S. 224, 74 L.Ed. 382, 50 S.Ct. 142 (1930); *Barnette v. Sayers*, 53 App. D.C., 169, 289 Fed. 567 (1923); *Davy v. Crawford*, 79 U.S. App. D.C. 375, 147 F.2d 574 (1945); *Rest. Contracts*, Ch. 12, Sec. 334, Pg. 552; *McCormick Damages*, Ch. 24, Sec. 146, Pg. 599.

Assuming, for the purpose of this argument, that the parties acted in good faith and that the breach was one that was incapable of or very difficult of accurate estimation, the amount fixed was not a just or reasonable estimation of the compensation to be caused by the harm inasmuch as it was in addition to defendant's other rights and remedies. It was an interrorum device to secure compliance by the plaintiff.

In this jurisdiction the parties may not provide for the double remedy of liquidated damages and contractual liability. *Jaeger v. O'Donoghue*, 57 App. D.C. 191, 18 F.2d 1013 (1927); *Sheffield v. Paul T. Stone, Inc.*, 68 App. D.C. 278, 98 F.2d 250 (1938); *United States v. Cunningham*, 75 U.S. App. D.C. 95, 125 F.2d 28 (1941); *MacNamee v. Hermann*, 60 App. D.C. 295, 53 F.2d 549 (1931).

Jaeger v. O'Donoghue, supra, is the most persuasive authority for plaintiff. In that case as this, the non-defaulting party sought to forfeit a specific sum while retaining a cause of action for actual damages. This court, while distinguishing *Barnette v. Sayers,* supra, on the basis that Barnette required an election, stated:

> "In the present contract it is attempted to give vendor the double remedy of forfeiting the deposit and also enforcing specific performance. This reduces the forfeiture of the deposit to a mere penalty which the law forbids. . ."

There is no factual question in the instant case relative to defendant's intention to hold plaintiff fully accountable under the lease in addition to forfeiting his deposit. One need only examine the letter of defendant's counsel dated January 5, 1965, (JA 93-94) wherein plaintiff was advised,

> "Accordingly, and without waiving any other rights to which landlord may be entitled, this is to advise you that pursuant to the express provisions of paragraph five (5) of the said lease, the promissory note in the original face amount of $39,642.20, dated June 26, 1963, bearing interest at six (6%) percent per annum and payable in monthly installments of $550, including both principal and interest, until paid, is regarded and treated as cancelled and paid in full. Accordingly, any and all rental obligations under the said lease for which you may still be liable shall here-

> after be computed at the prescribed lease rate of $4,000 per month without any deduction on account of the monthly payments to be credited against the promissory note aforesaid."

The lease itself, paragraph 5 (JA 29), provided in part, when speaking of the note in question,

> ". . . In the event, however, of a default under this lease by Tenant as provided hereinafter, in addition to any other rights and remedies which Landlord may possess with respect to such default, the entire balance of this advance remaining unpaid at the date of such default, and the promissory note evidencing the same, shall be regarded and treated as cancelled and paid in full."

Defendant, in addition to preserving her rights in the event of default, required the plaintiff to post a security deposit (JA 24); required rent in advance (JA 22); required a completion bond (JA 26); and did not subordinate her fee to any financing plaintiff placed on the property. She protected herself to such an extent that the forfeiture of any fixed sum would of necessity be a bonus to her and bear no relationship whatever to the actual harm which might be caused by a default.

B. The Provision Is Not A Reasonable Protection Against Uncertain Future Litigation.

Davy v. Crawford, supra, sets up an additional test to determine whether a provision forfeiting a fixed sum should be enforced. That case holds that the court should construe the contract as a whole as of the date of execution and if under the circumstances and expectations of the parties existing at the time of execution it appears that the provision is a reasonable protection against uncertain future litigation the provision will be upheld.

The reservation of all of defendant's rights and remedies in the instant case not only fails to comply with the test set out in *Davy*, it actually encourages future litigation, as it gives defendant the bonus of forfeiting the balance remaining on the note and allows her to then look to the plaintiff for such future damages as may develop.

Although not binding on this Court, numerous cases decided by the Municipal Court of Appeals (now District of Columbia Court of Appeals) concerning purchasers' deposits on real estate contracts, uphold forfeiture provisions only when they conclude and determine the damages resulting from breach and thus end uncertain future litigation. *Brodsky v. Linder*, 118 A.2d 803, D.C. Mun. App. (1955); *Simms v. Bovee*, 68 A.2d 800, D.C. Mun. App. (1949); *Schlosberg v. Shannon & Luchs Co.*, 53 A.2d 722, D.C. Mun. App. (1947); *Schwartz v. Rettger*, 83 A.2d 279, D.C. Mun. App. (1951); *Mitchell v. Ralph D. Cohn, Inc.*, 52 A.2d 691, D.C. Mun. App. (1947); *Brook Haven, Inc. v. Silverman*, 120 A.2d 591, D.C. Mun. App. (1956); *Berg v. Slaff*, 125 A.2d 844, D.C. Mun. App. (1956).

C. The Willingness Of A Party To Pay A Penalty Will Not Transform A Forfeiture Into An Enforceable Liquidated Damage Provision

Defendant puts great emphasis on the fact that plaintiff initially proposed the forfeiture provision contained in the promissory note and her statement of facts, paragraph 9 (JA 14) points out that the undated option delivered prior to the lease was prepared by plaintiff and contained in paragraph 9 thereof the provisions regarding the terms of repayment of the note herein. An examination of the option (JA 19) reveals that paragraph 9 does provide for cancellation of the note upon default under the lease, but nothing whatever is said about further rights of the landlord. The metamorphosis to a reservation of landlord's "other rights and remedies" in addition to forfeiture of the balance due on the promissory note took place some-

time between the date of the unexecuted option and the final lease. The author of the final lease provision is unknown and no one has come forth to take credit for it.

Notwithstanding the intention of the parties and assuming (a) that the forfeiture provision of the note was plaintiff's idea and (b) that all parties, represented by counsel, agreed to add the lease provision reserving all of defendant's rights, these factors either alone or in concert have no legal significance if the provision is in fact a penalty. There can be no doubt that in penal provisions of contracts it is generally the clearly expressed will of the parties that the penalties shall be paid if the main agreement is not performed, and their expressed will represents their actual intention, if that is of any importance. Williston, Contracts; Third Edition §777. The legal effect of the instrument depends on rules of law which sometimes contradict the meaning of the instrument and the intention of the parties.

> "'On the question of whether the provision is a penalty or liquidated damages, we are not construing the contract with reference to intention of the parties. Intent is of no practical importance. The question is not what the parties intended, but whether the sum was in fact in the nature of a penalty.'" Williston, citing *Central Trust Co. v. Wolf*, 255 Mich. 8, 237 N.W. 29 (1931).

Thus, in every case, either of penalty or of liquidated damages, the parties have manifested a clear intention that the sum stated shall be paid in the contingency which has occurred. If the matter were concluded by stating that the duty of the court is to give effect to the plainly expressed will of the parties, the recovery of penalties would universally be allowed.

Assuming that defendant was the unwilling recipient of a windfall which plaintiff wished to bestow on her, *McCormick* in speaking

of penal bonds at page 601 sums up exactly why the Court should not penalize plaintiff even if his present predicament is, in part, of his own making:

> "It is characteristic of men, however, that they are likely to be beguiled by the 'illusions of hope' and to feel so certain of their ability to carry out their engagements in future that their confidence leads them to be willing to make extravagant promises and commitments as to what they are willing to suffer if they fail. . ."

D. The Provision Is A Penalty As the Same Sanction Would Apply for a Trivial As Well as A Substantial Breach of The Lease

There is a further vexing issue presented by this case. The Lease provisions require the same "penalty" on any given date for a trivial breach, a substantial breach or a total breach. Failure to pay a small water bill could lead to the forfeiture of more than $30,000.00 and this is true notwithstanding the fact that the trial court did not feel the defendant would press her rights in this strict degree (JA 144).

The weight of authority is to the effect that where a contract contains a number of covenants of different degrees of importance, and the loss resulting from the breach of some of them will be clearly disproportionate to the sum sought to be fixed as liquidated damages, the sum so fixed will be treated as a penalty. *Seidlitz v. Auerbach*, 230 N.Y. 167, 129 N.E. 461 (1920).

A stipulation in a lease for a deposit to secure faithful performance of all its covenants by the lessee, the same to belong to the landlord as liquidated damages in case of breach and not to apply on any rent due or to become due, was held in *Lenco v. Hirschfeld*, 247 N.Y. 44, 159 N.E. 718 (1928), an action brought by the lessee to recover the deposit after his summary eviction, to be a provision

for a penalty, since the lease was so drafted that a breach of any covenant, however minute or unimportant, was to lose the lessee the entire security. As the then Chief Judge Cardozo stated:

> "The defendant makes the point that, without reference to any loss either through a reletting or through other causes, the deposit may be retained as liquidated damages. We think this point must fail. Viewed as an attempt to liquidate the damages, the provision is one for a penalty within the ruling of this court in Seidlitz v. Auerbach, (citation omitted). The lease is so drafted that a breach of any covenant, however minute or unimportant, is to bring down upon the tenant the loss of the entire security. A different situation would be here if the deposit had been accepted as the liquidated measure of the loss of future rents. (Citation omitted). There is no token of an intention that it should be so accepted or confined. On the contrary, the provision that the deposit shall be retained as liquidated damages is coupled with the statement of an understanding that 'said security shall not be considered as payment for any rent due or to become due by reason of these presents.' "

In the instant case, under the agreement of lease between the parties, there were innumerable instances where defaults could occur. Under paragraph 2c (JA 23) a default would occur in the event that the tenant should fail to pay any and all taxes, assessments, insurance, water and sewer charges and rents, and all other charges and expenses of whatever nature and kind imposed (except income and estate taxes), and in the event of a protest by the tenant of any of the foregoing tenant was to furnish landlord a performance bond to cover the contested items. Under paragraph 2(d) (JA 24) in the event that tenant failed to secure possession of all the individually leased units in the premises and begin remodeling the new construction thereof by January 15, 1964, a default would have occurred

and the landlord would have been entitled to the sum of $24,000.00 as "liquidated damages", the note would have become canceled and the landlord would have additionally been entitled to hold the tenant for any damages occurring out of the breach. Under paragraph 3 (JA 25) a default would occur on the event that the tenant failed to correct or repair and comply with any deficiencies or violations in conformity with requirements of the District of Columbia. Under paragraph 4(a) (JA 26) a default would have occurred in the event tenant failed to furnish landlord with a completion bond satisfactory and acceptable to landlord to assure completion of the remodeling or rebuilding work free and clear of liens. Under paragraph 4(c) (JA 27) any default under the lease entitled the landlord to possession of the premises and ipso facto extinguished and terminated any lien or right in the lease created by the tenant. Under paragraph 11(a) (JA 38) in the event of any default by the tenant in the payment of rent, taxes, insurance premiums, or other sums or charges, or of any payments due under any mortgage and deed of trust securing loan financing, or, in the event of any default or breach in any of the terms, provisions, agreements, covenants or conditions contained in the lease continuing for 30 days, the landlord, at her option, could terminate the lease, declare the term ended, and tenant's right, title and interest were to cease and expire except as to tenant's liability. Under paragraph 11(b) (JA 40) if the tenant failed to comply with any applicable statutes, municipal laws, rules, regulations and orders issued by any governmental authority within the period of time required by them, such failure constituted a breach of and default of the lease. Under paragraph 11(e) (JA 41) in the event of any bankruptcy, insolvency, adjudication, etc., by the tenant a default was to occur. Under paragraph 11(f) (JA 42) in the event any mechanic's or materialman's lien or other liens were placed against the property and not discharged within 5 days, the failure so to do constituted a default.

Some of the provisions were important, were highly necessary for the protection of the landlord, and were justifiable grounds for a "forfeiture" in the event of a breach. However, a breach of some of the very minor provisions would equally have created a default and the same result.

CONCLUSION

For the foregoing reasons, appellant submits that the judgment below should be reversed, and that this court should remand the case with instructions to enter judgment for the appellant.

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BRIEF FOR APPELLEE

IN THE

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No. 21964

BERNARD LYON FRISHMAN,
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MILDRED M. STONEBRAKER,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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ERRATA IN JOINT APPENDIX

1. Index should include the following:

   "Plaintiff's Statement of Facts . . . . . JA 9"

   "Defendant's Statement of Facts . . . . . JA 12"

2. JA 21, line 1: "/s/ Mildred M. Stonebraker" should read "Mildred M. Stonebraker" [typed, but not signed] See JA 9.

3. JA 54, line 23: The word "denied" should be "deemed".

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APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLEE

STATEMENT OF ISSUE PRESENTED FOR REVIEW

When, under a long-term lease of an office building providing for evacuation of its existing tenants so that the building can be remodeled or razed and rebuilt, a loan is made by the lessee (plaintiff herein) to the owner-lessor of the building (defendant herein) to enable the lessor to pay off an existing first mortgage on the building so that the lessee could place his own new mortgage financing there-

on, and the promissory note given therefore by the lessor to the lessee contains express provision, at the suggestion and request of the lessee-payee, that if the lessee should default under the lease any balance remaining under said note should be deemed paid and cancelled, in addition to any other remedies the note maker-lessor might have under the lease, and said note is cancelled after part payment thereon and the lease terminated pursuant to said provision as a result of the lessee's defaults under the lease, is the lessee entitled to have such cancellation set aside as constituting a penalty, when, because of the necessary cessation of rentals from the prior tenants of the building upon their removal therefrom, and the foreseeable cessation of rental payments from the lessee in the event of termination of the lease upon default, the lessor would forseeably be subjected to liability under said note because she would have no source of income available with which to pay said note even if she might have other remedies against the lessee under the lease, and when the note expressly provided that its payment should be by regular deductions to be taken by the lessee from his monthly rental payments under the lease, which rental payments and corresponding note-payment credits would, and in fact did, terminate as a result of the payee-lessee's defaults under the lease?

COUNTERSTATEMENT OF THE CASE

The Statement of the Case contained in Appellant's brief is substantially complete and accurate, except in the following respects:

1. The entry by defendant[1] and Public National Bank, on March 4, 1965, into an Agreement of Lease for a term of ninety-seven years and four months (JA 102-127), and the later assignment thereof to Harry L. Weisman and Edgar Weisman (JA 128-131), were both

[1] As in Appellant's brief, the parties herein will be referred to as plaintiff and defendant, references to plaintiff being to the appellant, Bernard Lyon Frishman, and references to defendant being to the appellee, Mildred M. Stonebraker.

pursuant to express terms of the initial lease with plaintiff included therein for the purposes of protection of plaintiff's mortgage (JA 42-43), as twice thereafter supplemented at such mortgagee's request (JA 57-60, 61-65); and said Agreement of Lease between defendant and Public National Bank was a new, separate and independent lease from the initial lease between plaintiff and defendant. (JA 21)

2. All rentals received by defendant after entry into the Agreement of Lease of March 4, 1965 with Public National Bank, whether from the Bank or its assignees, were paid and received under and pursuant to said new Agreement of Lease and not under or pursuant to the initial lease between plaintiff and defendant. (JA 15).

3. Defendant agrees that there was no loss of rental payments under the initial lease, said payments being made thereunder through January 31, 1965 (JA 15). However, there was no evidence submitted as to whether or not costs, expenses, or damages, other than as respects rental payments, were incurred or sustained by defendant, and the statement in Appellant's Brief, p. 7, that defendant ". . . suffered no damage as a result of any default under her lease with plaintiff . . ." is accordingly an unsupported legal conclusion.

4. The guarantee by plaintiff and others of payment to defendant of all rents and other payments due under the lease (Appellant's Brief, p. 4) was expressly provided to be effective only until completion of the remodeling or rebuilding of the improvements by plaintiff. (JA 10, 50).

SUMMARY OF ARGUMENT

1. Judicial declaration and prohibition, as a penalty, of provisions for the making, retention, or cancellation of a payment required or permitted to be made, retained, or cancelled pursuant to express contractual agreement between two parties, is an equitable remedy. It should not be invoked or granted on behalf of the very party who, as an integral part of a contract offer made by him, voluntarily pro-

posed that there be included the very right of cancellation of payment here involved, to be exercised by the other party in accordance with certain conditions specified in the proposal itself.

2. Under the circumstances of this case, the defendant's right, upon plaintiff's lease default, to cancel the promissory note given to plaintiff was not a penalty, but a proper means of protection against a danger of loss, damage, or liability not otherwise covered or capable of being covered by the lease.

3. Payment of the promissory note was expressly conditioned upon the continued existence of the initial lease between plaintiff and defendant and expressly provided to be made by plaintiff taking credit therefor out of the rental payments to be made by him thereunder. The termination of the funds to be used for such payments as a result of termination of the lease, and of the making and receipt of rental payments thereunder, cancelled the express conditions for payment of the note, and hence cancelled defendant's obligation for such payment.

ARGUMENT

1. **Judicial declaration and prohibition, as a penalty, of provisions for the making, retention, or cancellation of a payment required or permitted to be made, retained, or cancelled pursuant to express contractual agreement between two parties, is an equitable remedy. It should not be invoked or granted on behalf of the party who, as an integral part of a contract offer made by him, voluntarily proposed that there be included the very right of cancellation of payment here involved, to be exercised by the other party in accordance with certain conditions specified in the proposal itself.**

The relief sought here by plaintiff is plainly extracontractual, and in clear contravention of his express written undertaking and agreement.

> ". . . [A] court of law has no right to construe a contract contrary to the intention of the parties therein expressed, in order to make for them a better or more equitable contract than they made for themselves at the inception of the transaction, when both parties could view equally the advantages and disadvantages that would probably arise." *District of Columbia v. Harlan & H. Co.*, 30 App. D.C. 270, 279 (1908).

Cf. Simms v. Bovee, 68 A.2d 800, 802 (D.C. Mun. App. 1949).

But where a liquidated damages agreement is ". . . out of all proportion to any damages that could possibly accrue . . .", a court of equity may grant relief. *Id.; Cf. Hammett v. Ruby Lee Minar, Inc.*, 60 App. D.C. 286, 53 F.2d 144 (1931), *cert. den. sub. nom. Minar v. Hammett,* 284 U.S. 682, 76 L. Ed. 576 (1932).

It is, however, one of the most basic axioms of equitable relief that the party seeking such protection must not himself have created the very situation from which relief is sought by him.

Here, it is undisputed that the plaintiff himself, directly or through his representatives, proposed, as part of the total consideration for the lease arrangement sought by him, the terms of the loan and note here involved, for the purpose of better enabling plaintiff to place his own new financing for the remodeling or reconstruction of the building. (JA 10, 12, 13, 14, 15). The defendant neither requested, nor proposed, nor required, the arrangement for cancellation of the note and loan if the plaintiff-lender should default under the lease. (JA 14). And it is likewise undisputed that plaintiff was represented at the time of his proposal, throughout the negotiations, and at the time of execution of the lease and making of the loan, by competent counsel and knowledgable real estate brokers and agents. (JA 12, 14, 132, 137). There was no overreaching by defendant, or imposition upon plaintiff of unconscionable conditions which plaintiff, by reason of economic or other need or pressure, was powerless to withstand. (JA 137).

A court of equity should not permit one party to "booby-trap" a contract with provisions designed to induce agreement from the other party, and thereafter, upon the first party's own default, to blandly evade the consequences of his own proposal, from which he had already obtained the desired benefits (JA 142), by claiming the result is inequitable and unfair to him. He should be compelled to abide the results of his own acts.

This Court, as did the Court below, should reject the plaintiff's petition for relief, and hold that he is bound by his own act and contract. What was fair as a means of inducing agreement from a landlord who, though willing to consider, did not seek, a lease with plaintiff (JA 12, 13), does not become unfair when the tenant fails, by his own efforts alone and through no fault of defendant, to achieve the hopes and purposes of his lease. (JA 142).

2. Under the circumstances of this case, the defendant's right, upon plaintiff's lease default, to cancel the promissory note given to plaintiff was not a penalty, but a proper means of protection against a danger of loss, damage, or liability not otherwise covered or capable of being covered by the lease.

It is submitted that the defendant's right to cancel the note and her debt to plaintiff represented thereby was, under the facts of the case, a fair and a reasonable means of anticipatory compensation for and protection against a risk and an exposure to damage or liability in the event of plaintiff's lease default, which the lease itself did not, and could not effectively otherwise accomplish; and hence was not a penalty to be proscribed by the Court.

> "Courts presently look with candor upon provisions that are deliberately entered into between parties, and therefore do not look with disfavor upon liquidated damages stipulations. *"Southern Engineering Co. v. United States,* 341 F.2d 998, 1001 (CA 8, 1965).

See also, *United States v. Bethlehem Steel Co.*, 205 U.S. 105, 51 L.Ed. 731 (1907); *Kothe v. Taylor Trust*, 280 U.S. 224, 74 L.Ed. 382 (1930); *Manufacturers Casualty Ins. Co. v. Sho-Me Power Corp.*, 157 F. Supp. 681, 684 (W.D. Mo. 1957).

And the rule is no longer open to question that provisions for liquidated damages, and considerations of the circumstances grounding such provisions, are to be considered as of the time of entry into the agreement therefor, and not the date payment thereof is sought. *United States v. Bethlehem Steel Co., supra; Barnette v. Sayers*, 53 App. D.C. 169, 172, 289 Fed. 567 (1923); *Southern Engineering Co. v. United States, supra*, at p. 1003. Nor is the fact of relevance that damages may not have been actually suffered as of the time of the breach; only whether at the time of entry into the agreement the possibility of injury existed, was recognized, and was provided for. *Id.*

The office building which was the subject of the lease was, at the time of the lease negotiations and execution, occupied by numerous tenants (JA 24, 25), and encumbered only by a first mortgage lien of approximately $42,000, payable at the rate of $550 per month and bearing 3% interest per annum. (JA 14, 19). The existing tenancies and rentals clearly were available, and were presumably adequate (JA 142), to pay this charge; and the interest rate, even before the present mortgage money squeeze, was a most modest one. Defendant had no need or anxiety to alter this situation to her detriment.

However, it was a necessary concomitant of any lease with plaintiff, which would provide either for complete remodeling of the building, or complete razing thereof and erection of a new building, that the existing tenancies and rentals therefrom would have to be terminated, even if the existing mortgage lien would remain. (JA 24, 25, 26).

Under plaintiff's proposal, this existing mortgage lien would be removed by payment with the proceeds of the loan made to defendant by plaintiff, and plaintiff desired this be done in order better to be able to obtain the financing needed for his remodeling or rebuilding of the existing building. (JA 13). The obligation on defendant to pay the loan in the same, regular, monthly amount would remain, however, although defendant had initially indicated her desire that the entire existing mortgage be assumed by plaintiff (JA 13), and the interest rate would be doubled. (JA 3, 14). But instead of the original monetary source for payment of such sums by defendant, the rentals from the original building tenants, there would now be substituted the rental payable by plaintiff under the lease. (JA 19, 29, 142).

While the lease remained effective, and plaintiff performed thereunder, the note was automatically payable and to be paid, by deduction from the monthly rental payments themselves, and the balance due on the note would accordingly steadily decline. (JA 3). If the note should thereby be fully paid, as provided and contemplated, there could be no attempt to recapture such payments if a default should thereafter occur, and defendant would be left solely to her regular remedies for lease default, needing then no special protection with respect to payments made or required of her under the note. The clause permitting note cancellation operated only with respect to a balance still remaining unpaid under the note at the time of a default. It was not, and would not be, a stipulation ". . . designed to make the default of the party against whom it runs more profitable to the other party than performance would be. . . ." *Cf. Davy v. Crawford*, 79 U.S. App. D.C. 375, 376, 147 F.2d 574 (1945).

Admittedly, in the event of a default under the lease by plaintiff, defendant had various remedies, e.g., to terminate the lease, and rerent the building for plaintiff's account; to sue for the rent under the lease; to file a claim in a bankruptcy proceeding, if that should

occur. (JA 38-43) But none of these remedies, or any others which might be available under the lease, were capable, if the building should remain vacant, or unfinished, and with plaintiff in default under the lease, of producing any regular income whatever with which to repay the loan from plaintiff, so inextricably joined with the lease performance itself. (JA 143)

There was no guarantee that plaintiff's mortgagee, Public National Bank, would itself enter into a new lease with defendant, if plaintiff should default before completion of his remodeling or reconstruction work, take over the obligation to complete that work, and pay rent to defendant until new building tenants should be obtained. The bank's rights to do so were exercisable solely at its option, and it could choose instead to lose any sums already invested by it and avoid further loss or money drain. (JA 15, 42, 57-60, 61-65). And, although plaintiff was to furnish a bond, prior to beginning his remodeling or demolition of the building, that would assure completion of the work, this would not provide the regular rental income during the time needed for such completion, or the tenants and their rentals after such completion, with which defendant could pay the note to plaintiff; even assuming that the bond obligations should be fully and expeditiously carried out without delay or need for litigation. (JA 26).

As was so cogently stated by the Court below (JA 143).

> "Thus it is clear that the cancellation in fact, viewed from hindsight, operated substantially to defendant's benefit. It is equally clear, however, that the situation might have been quite different if there had not been a construction lender willing to take over and carry on the project. The property could well have remained in a non-rentable position for some time, tied up by uncertainties, litigation over mechanics' liens, or other contingencies, the precise nature of

> which was unforeseeable at the time the lease was entered into and the promissory note given. This was apparent to the parties at the time the lease and the note were signed."

The cases cited by plaintiff, such as *Jaeger v. Donohue,* 57 App. D.C. 191, 18 F.2d 1013 (1927), and *Brook Haven, Inc. v. Silverman,* 120 A.2d 591 (D.C. Mun. App., 1956), involve sales contracts granting both forfeiture of a deposit, and any other legal or equitable rights available for breach of the contract. The ruling in such cases that the seller would be relegated to either his normal remedies, or be permitted to retain the deposit, but not both, is clearly proper, since the damage to seller was the same, irrespective of the nature of the remedy sought. There was not, as here, a breach causing injury, or risk thereof, which remedies other than note cancellation and termination of defendant's obligation of payment thereunder, could not cure.

Nor do *Seidlitz v. Auerbach,* 230 N.Y. 167, 129 N.E. 461 (1920), or *Lenco, Inc. v. Hirschfeld,* 247 N.Y. 44, 159 N.E. 718 (1928), cited by plaintiff, meet the instant problem. In these cases involving leases, as in the sales contracts cases, the only damage or risk against which the landlord sought to protect himself was the loss of rents and income. There was no separate and distinct obligation for payment by him of a note, directly related to and dependent upon receipt of such rents, for failure of payment of which a liability would be incurred by the landlord; which liability could not be avoided by a suit for unpaid rent, if collectible, or other remedies available for protection against loss of anticipated rental income alone.

A seller or lessor, as a normal business risk judgment, can and does estimate in advance his possible loss of income or profit if the sale or lease should fail; and the normal remedies available to him, of suit to collect damages, rerental and claim for any rent losses, or

forfeiture of sales or security deposits, can be directly related to and evaluated in light of these potential losses. Not so here, however, when, in expectation of income the landlord undertakes a new obligation in place of an old one, at higher cost, and without the assurance of continued ability to meet that obligation from the rental resources formerly available therefor other than the rental hopefully expected to come from the new tenant.

It is submitted therefore, that the provision here for cancellation of any remaining balance due under the note in the event of a lease default was a remedy which took account of a danger of injury or loss to defendant, and of a liability for payment of the note without means or income therefor, which was reasonably foreseeable but which could not be accurately anticipated or measured at the time of contracting, which, obviously, neither party expected or hoped would occur, and for which no other remedy was effectively available. Moreover, it was a self-liquidating remedy, automatically calibrated to the decreasing risk to the defendant, over which the plaintiff himself, and not the defendant, had control by avoidance of his default, and which, upon liquidation of the note by regular payment would cease to constitute any benefit whatever to defendant.

As such, by the tests of equity set out in *U.S. v. Bethlehem Steel Co., Barnett v. Sayers,* and *Davy v. Crawford, supra,* the right of cancellation of the note proffered to defendant by plaintiff was a proper and valid protection against a foreseeable future injury or liability, uncertain in likelihood and risk, and impossible to measure more accurately than in terms of the remedy itself, a remedy which was not otherwise available or possible; and hence was not a penalty to be proscribed by the Court.

3. **Payment of the promissory note was expressly conditioned upon the continued existence of the initial lease between plaintiff and defendant and expressly provided to be made by plaintiff taking credit therefor out of the rental payments to be made by him thereunder. The termination of the funds to be used for such payments as a result of termination of the lease, and of the making and receipt of rental payments thereunder, cancelled these express conditions for payment of the note, and hence cancelled defendant's obligation for such payment.**

The note given by defendant provided in part as follows:

> ". . .[T]he first six (6) monthly instalments are to be paid in cash by maker [defendant], and thereafter by payee [plaintiff] deducting the amount of such monthly instalment from the monthly rental due to maker by payee under a certain Agreement of Lease dated March 22, 1963 . . ." (JA 3)

It is submitted that the obligation of defendant under said note is expressly conditioned upon the continued existence of the fund established as the source of payments to be made thereunder, and hence ceases to exist if the fund established therefor ceases and the condition for payment cannot be fulfilled. *Texas v. Hogarth Shipping Co.*, 256 U.S. 619, 629-630, 65 L. Ed. 1123, 1130, 41 S. Ct. 612 (1912); *Hood v. Gordy Homes, Inc.*, 267 F.2d 882, 885 (CA 4, 1959); *Mascioni v. I. B. Miller, Inc.*, 261 N.Y. 1, 184 N.E. 473 (1933).

That fund, in terms capable of no misconstruction, is provided to be the ". . .monthly payments due to [defendant] by [plaintiff] under a certain Agreement of Lease dated March 22, 1962. . ." (JA 3). *Cf. Hood v. Gordy Homes, Inc., supra.* The note and the payments due thereunder were not to be a general charge upon any rentals or other income derived from the property covered by plaintiff's Agreement of Lease, whether or not such rentals or income should be paid under

said lease, or upon any other assets or income of defendant. The fund was the payments due *from the plaintiff himself* under his lease for the property; and only such payments.[2]

Accordingly, when such rental payments ceased to be made, as here occurred upon termination of the lease of January 31, 1965, the condition upon which the note payments were to be made failed and all right of the plaintiff to receive such payments ceased. And the termination of the lease, and failure of the fund for and condition of payment of the defendant's note, were due to no fault of the defendant; they were rather the direct results of plaintiff's lease defaults, brought about solely by his own efforts. When the plaintiff himself, without defendant's fault, has brought about the cessation or destruction of the very fund or corpus from which the defendant's payments were to be made, he cannot be heard to complain of plaintiff's failure so to perform. *Cf. Porto Rico v. Title Guaranty & S. Co.*, 227 U.S. 382, 389, 57 L.Ed. 561, 564, 33 S. Ct. 362

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[2] It is interesting to speculate, in light of plaintiff's contention that any rental from the building, whether under plaintiff's or a later lease, should be made available to pay the defendant's note to plaintiff, how the amount of such payments should be calculated, in the event, after termination of plaintiff's lease, his mortgagee, the Public National Bank, should have refused to enter into a new lease with defendant, or only at a substantially lower rental, and defendant thereupon was forced to accept, from the Bank or a third party, a substantially lower rental. Would the prescribed note payments of $550 per month, including interest, be decreased proportionately to the reduced rental, in which case the doubled interest rate being paid by defendant (JA 3, 14) would greatly extend the term of note repayment and increase the total interest payable, or would the monthly payments remain the same, $550, in which case the defendant's net income from the rentals would be decreased disproportionately, and conceivably even totally wiped out, solely as the result of plaintiff's default?

It may however be conceded, that if, after his lease default, plaintiff had ever thereafter been compelled to make payments of or in lieu of his defaulted rentals thereunder, he would be entitled to deduct therefrom the note payments still due. *Cf. Sheffield v. Paul P. Stone*, 68 App. D.C. 378, 98 F.2d 250 (1938); *Lenco, Inc. v. Hirschfeld, supra.*

(1913); *Owens v. William H. Banks Warehouses, Inc.*, 202 F.2d 689, 692 (CA 5, 1953), *cert. den.* 346 U.S. 813, 98 L. Ed. 341, 74 S.Ct. 22 (1953); *Juett v. Cincinnati, N.O. & T.P. Ry. Co.*, 245 Ky. 379, 53 S.W. 2d 551, 553 (1932); *Haase v. Stokeley-Van Camp*, 257 Minn. 7, 99 N.W. 2d 898, 87 ALR 2d 726 (1959); *Vandegrift v. Cowles Engineering Co.*, 161 N.Y. 435, 55 N.E. 941 (1900).

This conclusion, drawn from the express terms of the note itself, is further reinforced by the fact that no payments thereunder, other than the initial cash payments for the first six (6) months of the note term, were ever to be made by the defendant herself. Rather, after the first six (6) months, all payments were to be made by the plaintiff himself by simple deduction from the monthly rentals to be paid by him under his lease. (JA 3)

The expiration of a fund expressly agreed to be the sole source of payment of an obligation is necessarily the termination of the obligation payable therefrom; and accordingly this action cannot lie.

CONCLUSION

For all the foregoing reasons, defendant submits that the judgment of the District Court in favor of defendant and dismissing the Complaint was correct, and should be affirmed, with costs to defendant.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,964

BERNARD LYON FRISHMAN

Appellant

v.

MILDRED M. STONEBREAKER

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT

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ARGUMENT

I.

THE VALIDITY OF A LIQUIDATED DAMAGES CLAUSE TURNS ON THE RESULT SOUGHT TO BE ACCOMPLISHED AND NOT ON THE ORIGIN OR METHOD OF ITS INSERTION

Defendant still labors under the mistaken impression that agreement or acquiescence by plaintiff transforms the substantive and

legal effect of the penalty provision. In short, defendant has taken the position that enforceability of an *in terrorem* device to secure performance varies directly with the amount of coercion applied.

In any contract, once the fundamental prerequisite of mutuality is established, enforceability turns on the validity of the provisions designed to effectuate its purposes. With regard to liquidated damages provisions, "the real issue involved, therefore, is whether the contract adheres to the fundamental rule of 'just compensation' . . . ." Williston, Contracts, Third Edition, § 778, citing *Pembroke v. Caudill,* 37 S.2d 538 (Fla. 1948). While defendant has taken an ambiguous position with respect to the negotiable importance of the penalty clause, in one instance urging that it was neither requested, proposed, nor required (Appellee's Brief, page 5) and in the next complaining that plaintiff had set a "booby trap" (Appellee's Brief, page 6), enforceability turns on an analysis of terms judged by the standards of just compensation, and not upon either mutuality or reliance.

Defendant has not cited any authority validating a penalty intentionally agreed upon. Both *Jaeger v. O'Donoghue,* 57 App. D.C. 191, 18 F.2d 1013 (1927) and *Sheffield v. Paul T. Stone, Inc.,* 68 App. D.C. 278, 98 F.2d 250 (1938) unequivocably demonstrate the contrary, that is to say, that any attempt to create a penalty for non-performance is unenforceable. Attention is invited to *Manufacturers Casualty Ins. Co. v. Sho-Me Power Corp.* 157 F.Supp. 681 (S.D. Mo. 1957) cited in defendant's brief, wherein the court stated as follows:

> "Courts will not enforce stipulations for liquidated damages where the stipulated sum to be paid is unreasonable or oppressive, or where it is established that it is in fact a penalty and not an agreement as to simple damages." 157 F.Supp. at p. 684.

II.

A CLAUSE WHICH FAILS TO COMPLETELY SETTLE AND DETERMINE THE RIGHTS AND OBLIGATIONS OF THE PARTIES CANNOT BE SAID TO PROVIDE FOR "LIQUIDATED" DAMAGES

The cases cited by defendant in support of her second Argument stand for the proposition that the courts will enforce agreements made to anticipate and determine the responsibilities and obligations of parties to a contract in the event of a future breach. This is generally true with the added proviso, that the provision be a fair and reasonable attempt to fix just compensation for anticipated loss occasioned by the breach, *Priebe & Sons, Inc. v. United States,* 332 U.S. 407, 92 L.Ed. 32, 68 S.Ct. 123 (1947), and provide a reasonable protection against uncertain future litigation. *Davy v. Crawford,* 79 U.S.App.D.C, 376, 147 F.2d 574 (1945).

Defendant has failed in her attempt to distinguish *Jaeger v. O'Donoghue, supra; Sheffield v. Paul T. Stone, Inc., supra,* and the other cases cited by plaintiff. She has not and cannot, cite any authority in the District of Columbia or elsewhere enforcing a double remedy. Cases upholding forfeiture provisions are based on the legal conclusion that the sum to be forfeited settles the damages between the parties. These provisions have one basic justification, that all rights and remedies will be terminated in exchange for payment of a particular sum. It is not relevant that plaintiff would be forfeiting the amount he loaned to defendant rather than being required to yield up a fresh penal sum. The formal aspect of payment does not disguise a penal forfeiture. If the cancellation of the note were defendant's only remedy and if it were reasonably proportionate to damage sustained by defendant as a consequence of breach, then there might be grounds to sustain the provision, but the collateral agreement provides that defendant has preserved to her all remedies for breach in addition to being entitled to cancellation of the note.

This constitutes an unenforceable penalty. See *Manhattan Syndicate, Inc. v. Ryan,* 220 N.Y.S.2d 337, 14 A.D. 323 (1961).

By no standard or test of equity does the creation of a double remedy constitute a proper and valid protection against foreseeable future injury. The double remedy itself belies the grounds under which defendant would have this court sustain it, for nothing was ever liquidated.

III.

Defendant's third argument that plaintiff's non-performance resulted in the destruction of the fund from which the loan was to be repaid, thereby rendering defendant's performance impossible, fails for several reasons.

A. AN *IN TERROREM* DEVICE IS NO LESS A PENALTY BECAUSE IT WORKS A FORFEITURE INDIRECTLY THAN IT WOULD BE HAD THE PROVISION ACCOMPLISHED THE SAME RESULT IN A LESS CIRCUITOUS MANNER

The note cancellation provision is unenforceable and without legal effect because it constitutes a penalty utilized as an *in terrorem* device to secure performance, which the law forbids. *McIlvenny v. Horton,* 302 S.W.2d 70 (Ark. 1957), *Continental Turp & Rosin Co. v. Gulf Naval Stores Co.,* 142 So.2d 200 (Miss. 1962); *Goldsborough v. Baker,* 3 Cranch C.C. Reports 48 (1826), *Gorco Construction Co. v. Stein,* 99 N.W.2d 69 (Minn. 1959); *Jaeger v. O'Donoghue, supra.* The method and source of payment does not alter the legal substantive effect, no matter how well disguised, *Manhattan Syndicate, Inc. v. Ryan, supra.*

B. THE ABSOLUTE OBLIGATIONS OF DEFENDANT TO REPAY THE LOAN ARE NOT ALTERED BY THE DESTRUCTION OF A SOURCE FROM WHICH THE PARTIES EXPECTED IT TO BE SATISFIED

The designation of the fund in the note, from which payment was expected to be made does not attenuate or alter the absolute obligation arising as a result of value received by defendant. Clearly, if during the period of the lease plaintiff had felt it necessary, either for taxation, accounting or other reasons, to pay the entire monthly rent at one time requiring a proper remittance by separate payment of the amount due under the note, defendant would have been obligated to repay.

In addition, paragraph 7 of the lease, concerning destruction of the premises by fire or other casualty, and paragraph 8, concerning total or partial taking by eminent domain, contemplate situations where plaintiff would not have access to any fund from which defendant's indebtedness might be deducted, yet there is no question that defendant would have been indebted and the money due.

C. EVEN IF REPAYMENT BY THE DEFENDANT DEPENDS ON THE EXISTENCE OF A SPECIFIC FUND, REPAYMENT OF THE LOAN WAS NOT DEPENDENT ON PLAINTIFF'S SUPERVISION OF THE FUND

Even assuming, *arguendo,* that the rents are considered to be the source of repayment to plaintiff, still it is clear that the existence of the fund did not depend on the tenancy of plaintiff, but rather on the availability of rents from any tenant rightfully in possession. This is demonstrated by the fact that plaintiff had the right to sell, lease, mortgage, or otherwise encumber his leasehold interest under paragraph 4(c) of the lease.

Clearly, in the event of a sale or assignment of his interest, plaintiff would not have been in a position to maintain or control

any fund or to make deductions therefrom on account of defendant's indebtedness to him, yet it may not be disputed that defendant would have been obligated to repay the note under its terms.

CONCLUSION

For the foregoing reasons, appellant submits that the judgment below should be reversed, and that this court should remand the case with instructions to enter judgment for the appellant.

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